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PROCUREMENT

Proposed amendments to the draft Model Law on Procurement

Note by the Secretariat

The present note sets forth a listing by the Secretariat of possible amendments to the draft Model Law on Procurement that the Commission might wish to consider during its review and adoption of the draft Model Law, in addition to any suggestions made by Governments in their comments as set forth in document A/CN.9/376 (and Add.1).

Title

It is suggested that the full title should read "UNCITRAL Model Law on Procurement". This would be in line with the titles of other model laws formulated by the Commission.

It may be helpful for a footnote to be added referring to the Guide to Enactment of the Model Law.

Article 2(g)

Consideration may be given to broadening the wording of the subparagraph so as to encompass two other functions of a tender security not presently mentioned. These other functions are: to cover withdrawal or modification of a tender after the deadline for submission of tender and to secure the obligation to supply a performance guarantee, if required to do so (see article 27(1)(f) of the Model Law, which lists those additional functions of a tender security). Instead of adding specific references to those additional functions, which might make the definition unwieldy, a more general wording might be substituted for the definition along the lines of "to secure fulfilment of certain obligations."

Articles 6(6) and 7(8)

It may be specified that disqualification should occur only in the case of "substantial" inaccuracy; disqualification for any inaccuracy may give too much scope for the procuring entity to disqualify for improper motives.

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Article 9(2)

The reference to article 11(3) should be replaced by a reference to article 18(3). Moreover, it may be questioned whether paragraph (2) should refer to article 32(1), since the latter provision concerns the notice of acceptance of a tender and therefore may have direct implications for the entry into force of the procurement contract. In that light, it may be preferable for such a communication only to be permitted in a form that provides a record of the communication.

Article 11(1)

Consideration might be given to adding to the required content of the record a summary of requests for clarifications and of the corresponding clarifications.

Article 11(3)

It is envisaged in the present text that a court could order disclosure of the information referred to in article 11(3)(f) and (g) at a point earlier than the termination of the procurement proceedings. However, those subparagraphs concern circumstances that could not arise until the end of the procurement proceedings. It is accordingly suggested to reformulate paragraph (3) as follows:

"... without resulting in a procurement contract, Disclosure of the portion of the record referred to in subparagraphs (c) to (e) may be ordered by a competent court. However, except when ... ."

In order to distinguish the information referred to in paragraph (3)(b) from the summary referred to in paragraph (1)(e), the following text may be added to paragraph (3)(b):

" ... and tender, proposal, offer or quotation prices, beyond the summary referred to in paragraph (1)(e)."

Article 14(1)(a)

In the chapeau, the expression "is unable to formulate detailed specifications" may be too restrictive since a procuring entity in a given case may be "able" to formulate specifications, but, nevertheless, for legitimate reasons, may seek proposals for solving its procurement need. The words "prefers not to formulate detailed specifications" might be more appropriate.

The Commission may wish to consider replacing the present text of subparagraph (ii) by a formulation along the following lines:

"because of the nature of the goods or construction, specifications cannot be established with sufficient precision to permit the award of the contract by selecting the successful tender according to the procedures set forth in chapter II."

Article 14(1)(c)

It may be considered that subparagraph (c) is unnecessary since article 1(2) permits the application of the Model Law to excluded sectors "to the extent that" the procuring entity may decide that it is appropriate.

Article 14(1)(d)

For the purposes of clarity and to avoid disputes as to the decision of the procuring entity on a matter that should be left to its judgment, it may be useful to replace the words "when engaging in new tendering proceedings" by the following: "when, in the judgment of the procuring entity, engaging in new tendering proceedings".

Article 16(f)

The same question may be raised as to the necessity of this provision as is raised above with respect to article 14(1)(c).

Article 16(g)

It may be noted that the approval requirement in subparagraph (g) is not presented as an option, unlike the references to approval at other points in the Model Law.

Article 17

The reference to article 11(2) should be replaced by a reference to article 18(2).

Article 19(1)(d)

The reference to article 8(1)(a) should be replaced by a reference to article (6)(2).

Article 19(2)

Paragraph (2) excludes the place and deadline for the submission of tenders from the information required to be set forth in the invitation to prequalify. However, article 7(3) requires that information to be provided in the prequalification documents. Since there would be cases in which the prequalification documents would be ready at the time of the issuance of the invitation to prequalify, article 19(2) may be modified to require the invitation to prequalify to indicate the place and deadline for submission of tenders, if known at that time.

Article 20

It would appear advisable to expand the application of the rule in the third and last sentence to the price that may be charged for prequalification documents. In that case the words "may charge for the solicitation documents" would be replaced by the words "may charge for the prequalification documents and the solicitation documents". The title of the article could then be modified to read as follows: "Provision of solicitation documents; price of prequalification documents and solicitation documents".

Article 21(f)

It may not be desirable to require that in all cases in which a contract is to be signed pursuant to article 32(2), the solicitation documents should contain the entire text of the contract to be signed, since there may be cases in which certain minor details may not be determined at the time of the issuance of the solicitation documents. The provision might rather refer to the principal terms and conditions of the procurement contract.

Article 21(g)

At present, the Model Law does not expressly require a procuring entity that solicits alternative tenders to disclose in the solicitation documents the manner in which the alternative tenders would be considered (e.g., whether a supplier or contractor submitting an alternative tender would also have to submit a tender in conformity with the specifications in order to have the alternative considered). The lack of an express rule on this point may be remedied by adding the following text at the end of subparagraph (g): "and a description of the manner in which alternative tenders are to be evaluated and compared."

Article 22

Consideration may be given to moving article 22 to chapter I, since the principle of objectivity in the description of the goods or construction in the solicitation documents would also have application in procurement proceedings involving methods other than tendering.

Article 22(3)(b)

It may be considered that this provision, if interpreted literally, would require the use of standardized trade terms and abrogate the right of the parties to vary those terms. A degree of flexibility may be added by replacing the words "Standardized trade terms shall be used" by the words "Due regard shall be had for the use of standardized trade terms".

Article 25(5)

Consideration may given to adding a requirement that tenders must be signed or authenticated in some other manner.

Article 26(2)(b)

It is suggested that the words "if it is not possible to do so" may be deleted since they suggest that a supplier or contractor agreeing to extend the tender validity period may only provide a new tender security if extension of the existing one were impossible. This would be an unintended effect since the supplier or contractor may have good reason for providing a new security and presumably could do so without negatively affecting the interests of the procuring entity.

Article 29(1)(b)

Consideration may be given to replacing the words "shall give notice" by the words "shall give prompt notice".

Article 29(4)(d)

The Commission may wish to consider adding an express requirement that use of a margin of preference should be reflected in the record. Such a requirement would also be reflected in article 11(1).

Article 29(5)

The following text may be added at the end of the paragraph in order to make it clear that the exchange rate used must be the one prescribed in the solicitation documents: " ... and comparing tenders according to the rate indicated in the solicitation documents in accordance with article 21(r)."

Article 32(3)

For a clearer statement of the role of the solicitation documents, the words "Where the procurement contract is required to be approved" may be replaced by the following: "Where the solicitation documents stipulate that the procurement contract is subject to approval".

Article 32(6)

In order to promote transparency in the procurement process, the disclosure requirement set forth in paragraph (6), which is currently limited to suppliers and contractors, could be extended to the general public. This might be accomplished by requiring publication of the notice of the procurement contract, as an obligation separate from the notice presently required to be given to suppliers and contractors.

Article 35(4)

In order to make clear the obligation of the procuring entity, the following text may be added at the end of paragraph (4): " ... of their proposals. The procuring entity shall select the successful offer on the basis of the best and final offers."

Article 36(1)

The following may be added at the end of paragraph (1) so as to further elucidate the precision with which the procuring entity should describe the components of the price quotation: " ... are to be included in the price and shall be informed about those charges, duties and taxes in the supplier's country that are to be excluded."

Article 38(2)(d)

The reference to article 28(1) should be replaced by a reference to article 30(1).

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